No. 45615-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

HISTORICAL MILITARY SALES INC
and DAVID ROBINSON,

Appellants,

vs.

CITY OF LAKEWOOD,

Respondent.

BRIEF OF RESPONDENT, CITY OF LAKEWOOD

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

Constitutional Provisions

City of Lakewood Codes/Ordinances

I. INTRODUCTION

Historical Military Sales and David Robinson (collectively "HMS") were caught with a cache of contraband and stolen military equipment and explosives. The City of Lakewood revoked HMS' business license, a decision which the City's Hearing Examiner upheld. To secure review of the Hearing Examiner's decision, HMS invoked the Washington Administrative Procedures Act (APA), chapter 34.05 RCW.

But in seeking review, HMS made two errors. The first was that it failed to timely serve Lakewood with its APA petition. RCW 34.05.542(2) requires a party proceeding under the APA to file and serve the petition for review within thirty days of service of the decision for which review is sought. *Sprint Spectrum, LP v. Dep't of Revenue*, 156 Wn. App. 949, 954, 235 P.3d 849 (2010). The second was invoking the APA at all. Our Supreme Court has held that municipalities are not "agencies," to which the APA applies. *Riggins v. Hous. Auth. of Seattle*, 87 Wn.2d 97, 549 P.2d 480 (1976); *Standow v. Spokane*, 88 Wn.2d 624, 636, 564 P.2d 1145 (1977)(overruled in part on other grounds by *State v. Smith*, 93 Wn.2d 329, 610 P.2d 869 (1980)). Either ground independently supports dismissal

RCW 34.05.542(2)'s timing requirement has been recognized by our Supreme Court as a jurisdictional prerequisite. *Seattle v. Public*

Employment Relations Com, 116 Wn.2d 923, 926-927, 809 P.2d 1377 (1991). Because of failure to timely effectuate service, the Superior Court did not have to reach this second ground presented by Lakewood. And, it properly denied as moot a request by HMS to "amend."

Under the circumstances, the Pierce County Superior Court properly dismissed HMS's action. It should be affirmed and Lakewood awarded its reasonable attorney fees defending this decision on appeal.

II. RESTATEMENT OF THE CASE

This case follows a joint investigation between the City of Lakewood, the US Army Criminal Investigative Division (CID) from Joint Base Lewis-McCord (JBLM) and the Pierce County Sheriff's Office, associated with the "illegal purchase, receipt and sales of stolen and restricted military equipment from Joint Base Lewis-McChord." (CP 8 (FF 1)).[1]

Lakewood and these other local law enforcement agencies had focused on "the HMS retail premises on Maple Avenue as part of a criminal investigation emanating from information that a former soldier … had stolen military equipment from JBLM and sold it to HMS." (FF 2). As part of the investigation, on March 22, 2013, an undercover deputy

[1] Because this case was decided on procedural grounds, the underlying administrative record was never transmitted to the superior court. Clerks Papers (CP) 8 to 17 is the decision of the City of Lakewood Hearing Examiner. All citations to "FF" are to the Hearing Examiner's Findings of Fact, supplying the factual backdrop to this dispute.

conducted a sale of controlled military hardware to HMS. (FF 7). For $100 and a used pair of boots, HMS purchased a "recently issued GPS system unavailable for civilian use and … a portable night vision scope clearly marked as US government property." (FF 7, 9). Following this sale, a search warrant was executed. (FF 2).

During execution of the warrant, significant amounts of contraband military materials were located at HMS' premises. (FF 10-15). Items of note included:

- Radios coded for military frequencies;
- infrared strobes;
- a recently issued and as yet commercially unavailable Combat Casualty Response Kit;
- unopened box of 15 cots and fuel and water cans, all prominently marked as US government property;
- live mortar charges;
- 32 Beretta M9 magazine clips in original packaging;
- ballistic plates of a military grade rigorously restricted to official use, clearly marked as such and never released to the civilian market;
- a reputed Claymore antipersonnel mine. The military claimed the Claymore was capable of being exploded with

> the addition of a firing device. HMS maintained that this item was inert.

Id.

Based on the equipment located on-site, the City served upon HMS notice of its intent to revoke HMS' license to do business within the City of Lakewood. (FF 1). HMS timely appealed the City's decision to the City's Hearing Examiner. (FF 1). In a detailed decision, dated August 5, 2013, and following two days of hearings with testimony, the Hearing Examiner upheld the City's decision to revoke HMS' business license. (CP 8-17). The Hearing Examiner's decision was emailed by the City Clerk to all parties that day, and was mailed two days later. (CP 55).

On September 4, 2013, HMS filed a petition in Pierce County Superior Court seeking review of the Hearing Examiner's decision under the APA. (CP 1). HMS did not serve the City until September 13, 2013. (CP 53). The City moved to dismiss the APA petition on two grounds: (1) that the APA was the incorrect means to seek review of the decision at issue; and (2) even if the APA did apply, service was untimely under RCW 34.05.542(2). (CP 18-23). In response, on October 24, 2013, HMS moved pursuant to CR 15 for leave to amend. (CP 24). In its proposed amended complaint, HMS omitted the APA as a basis for review. (CP 33-40). Instead, its proposed amended complaint sought leave to assert three

causes of action: (1) declaratory relief; (2) a statutory writ of review; and (3) a constitutional writ of review.

On November 8, 2013, the Superior Court granted the City's motion to dismiss, noting that HMS's non-compliance with RCW 34.05.542(2) precluded review. (CP 45-46). As a result, it also denied HMS' motion to amend as moot. *Id.* HMS appeals. (CP 47).

III. ARGUMENT

A. The Superior Court Properly Dismissed this Case.

"The courts recognize three methods of appeal from administrative decisions: direct appeal expressly authorized by statute[;] review pursuant to a statutory writ of certiorari, RCW 7.16.040; and discretionary review pursuant to the courts' inherent constitutional powers." *Kreager v. WSU*, 76 Wn. App. 661, 664, 886 P.2d 1136 (1994)(citing, *Pierce Cy. Sheriff v. Civil Serv. Comm'n*, 98 Wn.2d 690, 693, 658 P.2d 648 (1983))(footnoted citations omitted). This Court has previously recognized that the statutory writ is a proper means of challenging local hearing examiner's decisions, such as those made under Lakewood's business code. *Heesan Corp. v. City of Lakewood*, 118 Wn. App. 341, 348, 75 P.3d 1003 (2003)[2]; *see also*, *City of Tacoma v. Mary Kay, Inc.*, 117 Wn. App. 111, 116 fn. 8, 70 P.3d

[2] *Heesan Corp.* deals extensively with the provisions of chapter 5.02 Lakewood Muni. Code – which is the same chapter involved in the case at bar. Since then, this chapter has been amended several times (and during the pendency of this case). Despite these amendments, the underlying legal analysis of that case remains sound.

144 (2003). Despite these holdings, HMS elected to invoke review under the APA.

In doing so, HMS made two errors, either of which would have independently supported dismissal. First, the APA does not ordinarily apply to municipalities. Second, having invoked the APA, HMS was required to comply with the deadlines within the APA, notably those codified at RCW 34.05.542, which have been construed to be jurisdictional in nature. Because, "[f]irst and basic to any litigation is jurisdiction," and the second of these grounds is indisputably jurisdictional, we take these grounds in reverse order. *Dobbins v. Mendoza*, 88 Wn. App. 862, 871, 947 P.2d 1229 (1997).

1. HMS' Failure to Comply with the Requirements of RCW 34.05.542 Deprived the Superior Court of Jurisdiction.

Article IV, section 6 of the Washington Constitution gives superior courts two forms of jurisdiction described as "original trial jurisdiction" and "original appellate jurisdiction." *James v. Kitsap County*, 154 Wn.2d 574, 588, 115 P.3d 286 (2005). In attempting to urge a contrary result as that reached by the trial court, HMS confuses and mix-and-matches these two kinds of superior court jurisdiction and the associated procedural requirements for each. Regardless of which kind of jurisdiction may have been intended to be invoked, "while a superior court may be granted

power to hear a case under article IV, section 6, that grant does not obviate procedural requirements established by the legislature." *Id.*, 154 Wn.2d at 588-89. Thus, while HMS may have intended to invoke some form of superior court jurisdiction, it was required to timely comply with the procedural requirements of whatever form of that jurisdiction it sought to invoke. *See id.*

HMS stated that the superior court's jurisdiction was invoked under the APA. (CP 4-5 ¶¶ III(a), (c), (h)). Most, if not all, of HMS's procedural-based arguments on appeal implicate the commencement of claims under the superior court's original trial jurisdiction. Therefore, temporarily putting aside the issue of whether HMS should have invoked the APA at all, it is appropriate to look, not to those rules associated with the superior court's original trial jurisdiction, but to its appellate role under the APA.

The starting point in evaluating compliance with the APA's procedural requirements is RCW 34.05.542. RCW 34.05.542(2) provides:

> A petition for judicial review of an order shall be filed with the court and served on the agency, the office of the attorney general, and all parties of record within thirty days after service of the final order.

(Emphasis added).

The Supreme Court explained that compliance with this statute is a jurisdictional requirement:

> When reviewing an administrative decision, the superior court is acting in its limited appellate capacity, and all statutory procedural requirements must be met before the court's appellate jurisdiction is properly invoked. Therefore, under the administrative procedure act (APA), the superior court does not obtain jurisdiction over an appeal from an agency decision unless the appealing party files a petition for review in the superior court and serves the petition on all of the parties. Both of these steps must be accomplished within 30 days after the service of the final decision of the agency.

Seattle v. Public Employment Relations Com, 116 Wn.2d at 926-927 (internal citations and quotation marks omitted)(Emphasis added).

This Court reviews whether a court has jurisdiction de novo. *Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 314, 76 P.3d 1183 (2003). Dismissal in this case was not based on some sort of statute of limitation or curable defect, as HMS urges. Dismissal was dictated because HMS failed to comply with the prerequisites associated with the limited statutory appellate jurisdiction conferred by the APA, and owing to the passage of time, its noncompliance may not be cured.

Here, having plead that review was sought under the APA, the APA-related timeframes for seeking review are undisputed. The decision was emailed by the Lakewood City Clerk to the parties on August 5, 2013,

and a follow-up mailing occurred on August 7, 2013. (CP 55).[3] The Petition was filed on September 4, 2013. (CP 1). The deadline under RCW 34.05.542(2) by which filing and service were to be accomplished is one of two dates: September 4, 2013 (30 days from receipt of the email decision) or September 6, 2013 (30 days from date of mailing).[4] However, HMS did not serve the City until September 13, 2013. (CP 53).

Before the superior court, HMS appears to concede that under the APA that its filing was too late, acknowledging that "...on any reading of the facts presented by the plaintiffs, the plaintiff must concede that at the latest we can claim is on the 31st day Lakewood was served ..." (VRP 7). The City maintains it was nine days too late. Regardless of whose calculation is correct and giving HMS the benefit of any doubt, it is similarly undisputed that the City (whether it was the "agency" or a "part[y] of record") was not served with HMS' petition "within thirty days after service of the final order." RCW 34.05.542(2). The September 13, 2013 service of the petition, under any calculation, was untimely.

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[3] In its brief, HMS argues that the decision "was not mailed to the Plaintiffs (or Plaintiffs' attorneys) until August 12, 2013." (Appellant Br. at p. 3 citing CP 55). Clerks Papers 55 states otherwise. The decision was distributed, i.e., mailed, on August 7th. *Id.*, ¶ 3. We assume that the August 12th date is likely referring to when the decision was received or more likely when, using a CR 5(b)(2)(A) analysis, HMS maintains that any mailing should be deemed complete. Even if this date were used, service was two days too late.

[4] Applying the APA, because the decision was mailed, service was "complete upon deposit in the United States mail." RCW 34.05.010(19). There is, however, no requirement in the APA regarding the formality of the notice which commences the 30-day appeal period. *See e.g., Bock v. State*, 91 Wn.2d 94, 586 P.2d 1173 (1978). Because HMS missed both dates, it is unnecessary to resolve which date started the 30-day clock.

HMS chose to invoke the APA as its sole basis for review. It was therefore required to comply with the APA. Because HMS failed to timely serve Lakewood within the thirty-days mandated by RCW 34.05.542(2), this Court can affirm on the ground reached by the trial court.

2. The APA is not a Proper Vehicle to Secure Review of a Municipal Determination.

Even if HMS could satisfy the time requirements of RCW 34.05.542(2), an independent ground supports affirmance. Although the trial court did not predicate its decision upon this ground, because a portion of RCW 34.05.542(2) requires that timely service also be made upon "the agency," it is necessary to determine whether Lakewood was an "agency," to which the APA applies. Because the APA is inapplicable, affirmance on this alternative ground is proper.

Two decisions from the Washington Supreme Court squarely resolve this issue, *Riggins v. Hous. Auth. of Seattle* and *Standow v. Spokane*. Both of these cases unambiguously hold that the APA does not apply to municipalities and that the APA is limited only to state agencies.

The APA provides both the starting point and the end-point in this analysis. The APA only applies to "agencies." *Riggins*, 87 Wn.2d at 99. The APA defines what constitutes an "agency," subject to its provisions:

> "Agency" means any state board, commission, department, institution of higher education, or officer, authorized by law to make rules or to conduct adjudicative proceedings, except those in the legislative or judicial branches, the governor, or the attorney general except to the extent otherwise required by law ....

RCW 34.05.010(2).

This definition "clearly indicates the legislature intended WAPA to apply only to state boards, commissions, departments, and officers, i.e., only to those government entities clearly involved in statewide programs. This statutory language itself indicates that the legislature intended the definition to have a narrow application." *Riggins*, 87 Wn.2d at 100 (Emphasis by the Court). In this vein, the broad definition of "state agencies," without more, does not encompass local agencies, such as the City of Lakewood. *Id.*, 87 Wn.2d at 101. Indeed, "[t]he legislature did not intend this definition to include local agencies ... that are not concerned with statewide programs or that are not part of a statewide system." *Id*, 87 Wn.2d at 101.

With few exceptions (none of which are applicable here), the APA will not serve as a mechanism to review a municipality's decision-maker's decision. All of these exceptions, however, require a separate statute which makes the APA applicable. *See e.g.*, RCW 69.50.505(5)(review of controlled substance asset forfeitures); RCW 9.96A.040 (review of denials

based on certain felony convictions). As noted by the *Standow* Court in rejecting the use of the APA over routine business licensing issues, "the administrative procedures act does not ordinarily apply to municipal corporations making decisions of a local nature[.]" 88 Wn.2d at 636. Where the APA is invoked, and it does not apply, dismissal of the action is proper. *See Riggins,* 87 Wn.2d at 101.

Under *Riggins*, because the superior court's jurisdiction was involved solely under the APA, and because the APA does not apply to the City of Lakewood, the City would have been entitled to dismissal as a matter of law on this ground.

B. The Superior Court Did Not Err In Denying HMS' Motion to Amend.

HMS spends much of its briefing addressing the propriety of the denial of its motion to amend brought under CR 15. For three reasons, the motion to amend was properly denied. *First*, if jurisdiction was lacking, dismissal – not an amendment – was the only proper action which the trial court could have taken. *Second*, under the APA, reliance on this (or on any other) civil rule is inappropriate. *Third*, as this Court has recognized, the use of the incorrect procedural vehicle to secure review will merit dismissal of the action, and in this case, any would-be amendment would be futile given the timing.

Review of this claim implicates two standards of review. The issue of whether the civil rules apply at all is a question of law, subject to de novo review. *Niccum v. Enquist*, 175 Wn.2d 441, 446, 286 P.3d 966 (2012). Only if CR 15 is held to apply, "[t]he standard of review of a trial court's denial of a motion to amend a pleading is 'manifest abuse of discretion.'" *Herron v. Tribune Pub. Co.*, 108 Wn.2d 162, 165, 736 P.2d 249 (1987). Under either standard, denial of the motion was proper.

1. Dismissal – Not an Amendment – is the Appropriate Outcome

The remedy of dismissal comports with the well-settled holding that "[w]hen a court lacks subject matter jurisdiction, dismissal is the only permissible action the court may take." *Shoop v. Kittitas County*, 149 Wn.2d 29, 35, 65 P.3d 1194 (2003) (Emphasis added). As this Court has also recognized, albeit in a different context, when "the trial court d[oes] not have jurisdiction in the first instance, it also lack[s] jurisdiction to authorize an amendment of the pleadings[.]" *Cmty. Invest. v. Safeway Stores*, 36 Wn. App. 34, 38, 671 P.2d 289 (1983). Where noncompliance with statutory requirements prevents the superior court from acquiring jurisdiction, "dismissal without prejudice is the limit of what a court may do." *Hous. Auth. of City of Everett v. Kirby*, 154 Wn. App. 842, 850, 226 P.3d 222 (2010) (citations omitted).

"Jurisdiction is not a light bulb which can be turned off or on during the course of the trial." *Silver Surprize v. Sunshine Mining Co.*, 74 Wn.2d 519, 523, 445 P.2d 334 (1968). Here, HMS's non-compliance with the service requirements of RCW 34.05.542 is indisputably jurisdictional, placing the switch firmly in the off position. HMS's remaining arguments are unavailing and do not flick the jurisdictional switch on.

2. The Rules of Civil Procedure Do Not Apply In this Case.

Although HMS dedicates substantial attention in its briefing to its claimed ability to amend their petition under CR 15 and RCW 34.05.510(2), the rule and the statute are inapposite and HMS rests their argument on a faulty premise: that there was a "complaint," to "amend."

The civil rules, by their terms, govern only civil proceedings "except where inconsistent with rules or statutes applicable to special proceedings." CR 81(a). The APA provides that the civil rules are applicable to certain "[a]ncillary procedural matters," but only to the extent that the civil rules are not inconsistent with the APA. RCW 34.05.510(2). Although the statute enumerates a number of applicable procedural matters, an "amendment" of pleadings is not one of them.

As the Supreme Court recognized in *Diehl v. Growth Mgmt. Hearings Bd.*, "it [is] more appropriate to look to the rules of appellate

procedure, rather than the civil rules, given the appellate jurisdiction of the trial court under the APA." 153 Wn.2d 207, 216-17, 103 P.3d 193 (2004)(citations omitted). Thus, looking to the requirements of the APA, juxtaposed against the Rules of Appellate Procedure, suggest that an "amendment," if allowed at all, is to be limited in scope.

RCW 34.05.546 sets forth the requirements of what a petition under the APA is required to contain. Below, we cross-reference each of these requirements with an applicable Rule of Appellate Procedure:

	APA (RCW 34.04.546)	RAP
The name and mailing address of the petitioner	.546(1)	RAP 5.3(a)(2)
The name and mailing address of the petitioner's attorney, if any;	.546(2)	RAP 5.3(c)
The name and mailing address of the agency whose action is at issue;	.546(3)	RAP 5.3(a)(3)
Identification of the agency action at issue, together with a duplicate copy, summary, or brief description of the agency action;	.546(4)	RAP 5.3(a) (Second paragraph)
Identification of persons who were parties in any adjudicative proceedings that led to the agency action;	.546(5)	RAP 5.3(c)

Facts to demonstrate that the petitioner is entitled to obtain judicial review;	.546(6)	RAP 10.3(a)[5]
The petitioner's reasons for believing that relief should be granted;	.546(7)	RAP 10.3(a)
A request for relief, specifying the type and extent of relief requested.	.546(8)	RAP 10.3(a)(7).

HMS's proposed amendment does not address any of these content-based procedural issues which are addressed by any RAP 5.3 or RAP 10.3 analogues. Furthermore, while an appeal to this Court may be amended to "include additional parts of a decision in order to do justice," or to "include acts … that are subsequent to the act for which … review is sought …," RAP 5.3(h); the "amendment," sought by HMS does not address any other decision from the Hearing Examiner. Instead, the "amendment," requested by HMS sought to convert its APA-based proceeding to an entirely different species of action. Nothing in the APA or the Rules of Appellate Procedure (applied by analogy) permits such an outcome.

Thus, as a purely legal matter, the "amendment," was properly denied.

[5] The notice of appeal does not require complete listing of all issues to be reviewed, and a party's brief on the merits may address these issues. *Stevens v. Gordon*, 118 Wn. App. 43, 58, 74 P.3d 653 (2003).

3. Viewed Under a CR 15 Framework, the Amendment Would Have Denied as Either Futile or Inexcusable Neglect.

Employing CR 15 in the instance proffered by HMS presents additional procedural concerns which also merit affirmance. HMS has suggested that any would-be amendment would "relate back," to the date of the original filing, which as we discuss below on these facts, must be satisfied to ensure that any writ application is timely. *See*, CR 15 (c). Relation back under CR 15(c) does not apply where the omission constitutes inexcusable neglect. *Haberman v. Washington Pub. Power Supply Sys.*, 109 Wn.2d 107, 173-74, 744 P.2d 1032 (1987).

This Court has previously recognized in those circumstances where a party selects an incorrect procedural vehicle to obtain review of a local administrative decision, the failure to timely comply with the procedural requirements of the correct vehicle will merit dismissal. *City of Tacoma v. Mary Kay, Inc., supra*.

In *Mary Kay*, the City of Tacoma sought to challenge a City of Tacoma Hearing Examiner decision determination that an out-of-state company was not liable for Business and Occupation Taxes. Tacoma relied on a provision of its municipal code, which provided that any hearing examiner challenges shall be de novo to Superior Court, and accordingly, filed a notice of appeal seeking review with the Pierce

County Superior Court. Mary Kay moved to dismiss, citing a lack of Superior Court jurisdiction.

In reversing the order denying the motion to dismiss, this Court (on discretionary review) first observed that the notice of appeal was inadequate to invoke the superior court's jurisdiction because the City could not proscribe the superior court's jurisdiction in its municipal code. Relevant here, this Court also held that because appellate jurisdiction did not lie in the Superior Court, the only way for the City of Tacoma to seek redress was to have invoked the superior court's original jurisdiction by some other method. *Mary Kay*, 117 Wn. App. at 116. To that end, this Court provided guidance for future litigants:

> Tacoma could have sought review either through a statutory writ under chapter 7.16 RCW or by the court using its inherent power to review via a constitutional (common law) writ. But to secure a statutory writ of review, Tacoma would have had to comply with the applicable statutory requirements of chapter 7.16 RCW, which arguably it did not do here.

Id., 117 Wn. App. at 116, fn. 6.

Implicit in this Court's decision is that the improperly filed notice of appeal would not be treated as a substitute for another vehicle to obtain review, such as a writ petition or a complaint. If an action seeking one form of review could be readily converted to another, this Court would not have remanded the matter for dismissal. Instead, it would have remanded

the matter for further action, such as allowing Tacoma the opportunity to "comply with the applicable statutory requirements." *Id.*

Although HMS sought to procure review via the APA, and not via a direct notice of appeal, the discussion in *Mary Kay* is apt and the outcome should be the same. Aside from the level of detail contained within the petition, as noted above, an APA petition and a notice of appeal under the Rules of Appellate Procedure are similar. A misfiled APA petition will not serve as a substitute for a writ petition or a properly filed complaint to review a decision of an inferior tribunal, even if the superior court would otherwise have had jurisdiction. *See id.*

Appellate holdings interpreting the APA are sufficiently basic and well-settled that practice manuals alert the practitioner that "[b]ecause municipal corporations are not 'agencies' for the purposes of the APA, reliance on APA rules or standards when reviewing local government action would be misplaced." Washington Administrative Law Practice Manual, Ch. 14, § 14.01 (Matthew Bender)(collecting cases); *see also*, Karl B. Tegland, 15 WASH. PRACTICE: CIVIL PROCEDURE § 42.10 (2009)("The APA applies only to state agencies.")(Emphasis in original). The inability of HMS to correctly identify which form of review it desired and to comply with the correct procedural requirements is inexcusable neglect. Reinforcing the notion that the neglect shown in this case is the

maxim: "All parties to an action have an equal responsibility to be apprised of pertinent court rules, statutes, and ordinances." *Woodcrest Inv. Corp. v. Skagit County*, 39 Wn. App. 622, 626, 694 P.2d 705 (1985). As the foregoing authorities illustrate, the APA is simply inapplicable as to municipalities and cursory research would have revealed as much.

Indulging for the moment, HMS' assumption that it could apply in this case, application of the relationship back doctrine is further complicated by determining when the Civil Rules begin to apply. As noted by our Supreme Court, "the civil rules are clearly intended to apply only to civil actions invoking the general jurisdiction of the superior courts[.]" *Diehl*, 153 Wn.2d at 216. And, "a civil action is commenced by service of a copy of a summons together with a copy of complaint … or by filing a complaint." CR 3. HMS never commenced a "civil action," because its APA filing "invoke[d] appellate, not general or original superior court jurisdiction." *Diehl*, 153 Wn.2d at 216. Prior to the promulgation of the Civil Rules, the rule was that "an amended complaint [that] abandons a former or cause of action, it does not relate back to the original complaint but, instead, rests the action upon the pleadings as amended." *Hill v. Withers*, 55 Wn.2d 462, 467, 348 P.2d 218 (1960). Because the Civil Rules could not have applied to HMS's APA-based filings, with any would-be amendments, the APA claim would be

abandoned and therefore application of the "relationship back," doctrine is to the date of filing is inapt. The earliest the Civil Rules could have applied would have been upon a hypothetical grant of leave to file a complaint. By then, however, it was too late for HMS to obtain review.

The other forms of review identified by HMS in its proposed amended complaint are distinct means of obtaining limited appellate review of a judicial or quasi-judicial action. *Coballes v. Spokane County*, 167 Wn. App. 857, 865, 274 P.3d 1102 (2012); *see also, Fed. Way Sch. Dist. No. 210 v. Vinson*, 172 Wn.2d 756, 768, 261 P.3d 145 (2011)(noting that writ proceedings are not a substitute for an appeal). The scope of review of each of these modalities is different. *Coballes*, 167 Wn. App. at 867. As *Mary Kay* indicates, the procedural requirements necessary to invoke the superior court's jurisdiction also differ. Finally, of particular relevance here, each of these methods contains time limitations. However, if the proposed amendment is futile, leave to amend should be denied. *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 729, 189 P.3d 168 (2008). This futility rule applies because HMS sought these other forms of relief after the expiration of the associated deadlines.

For statutory writs, where there is otherwise no deadline, a court will apply by analogy the deadline to seek review of an analogous decision, and if none, then to the timeframe for seeking review of a

decision of a court of limited jurisdiction – currently thirty days.[6] *Clark County Pub. Util. Dist. No. 1 v. Wilkinson*, 139 Wn.2d 840, 847, 991 P.2d 1161 (2000); RALJ 2.5(a). This deadline has been treated as a jurisdictional bar. *Teed v. King County*, 36 Wn. App. 635, 641, 677 P.2d 179 (1984)(citations omitted). Requests for declaratory relief fall within these same timeframes. *Summit-Waller Assn. v. Pierce County*, 77 Wn.App. 384, 392, 895 P.2d 405 (1995) (internal citation omitted). This date passed at approximately the same time HMS's APA deadline under RCW 34.05.542 passed.

Similarly, in seeking a constitutional writ, a superior court may properly decline to issue a constitutional writ "if either a statutory writ or a direct appeal is available, unless the appellant can show good cause for not using those methods." *Birch Bay Trailer Sales v. Whatcom County*, 65 Wn. App. 739, 745-46, 829 P.2d 1109 (1992) (citation omitted). HMS missed the deadline to seek a statutory writ, negating any such "good cause." This Court has recognized that the statutory writ is a proper means of challenging local hearing examiner's decisions, such as those

[6] Lakewood's Code, at the time of the filing of the petition, lacked such a timeframe. However, if a local code proscribes a reasonable timeframe, courts will honor that deadline in evaluating the timeliness of seeking the statutory writ. *Foss Mar. Co. v. Seattle*, 107 Wn. App. 669, 672, 27 P.3d 1228 (2001)(applying as reasonable 14 day timeframe for seeking review of municipal hearing examiner's tax decision); *Griffith v. City of Bellevue*, 130 Wn.2d 189, 922 P.2d 83 (1996)(twenty day provision in local ordinance); *Birch Bay Trailer Sales v. Whatcom County*, 65 Wn. App. 739, 829 P.2d 1109 (1992)(ten days).

made under Lakewood's business code. *Heesan Corp.*, 118 Wn. App. at 348.

* * *

Case law already holds that where jurisdiction is lacking, dismissal is the limit of a court's authority. By extension, anything more is improper. As illustrated, deviating from this bright-line rule under the umbrella of a CR 15 analysis, particularly in the APA realm, creates a procedural morass. A brief toe-dip into this quagmire, however, reflects that the application of traditional CR 15 principles reinforces the propriety of the trial court's denial of HMS' motion to amend.

C. Lakewood Requests Fees and Costs On Appeal.

In accordance with RAP 18.1, the City of Lakewood requests its fees and costs pursuant to the provisions of Lakewood Municipal Code 5.02.230. That provision of the municipal code states in full:

> In addition to or as an alternative to any other penalty provided herein or by any other business license or regulation ordinance, the City shall be entitled to its costs and reasonable attorneys fees in any action to enforce the provisions of this Chapter or any other business license or regulation ordinance.

Where a municipal code provision authorizes an award of fees, under RAP 18.1, this Court properly awards such fees to a prevailing

municipality. *City of Seattle v. Mighty Movers, Inc.*, 152 Wn.2d 343, 363, 96 P.3d 979 (2004).

The initial license revocation action was clearly "an action to enforce the provisions," of Lakewood's business code. As the Hearing Examiner concluded, "[t]he City has met its burden of proof to establish by a preponderance of the evidence that HMS violated LMC 5.2.080[7] and that revocation or suspension of its business license is a legally warranted regulatory response". (CP 15 (Concl. Of Law 10)). Both the superior court proceedings and the current appeal are proceedings defending the enforcement undertaken by Lakewood. Although Lakewood did not request fees below, if it had requested them, it would have been entitled to them. Accordingly, since Lakewood was entitled to attorney's fees under this Code provision below, it is also entitled to attorney's fees on appeal. *See e.g., Sarvis v. Land Res.*, 62 Wn. App. 888, 894, 815 P.2d 840 (1991).

[7] In November 2013, LMC 5.02.080 was amended, in part. City of Lakewood Ordinance 568. The then-existing version is set forth at CP 14.

CONCLUSION

The City of Lakewood requests that this Court affirm the decision below and award it fees and costs incurred on appeal.

DATED: May 23, 2014.

CITY OF LAKEWOOD,
Heidi Ann Wachter, City Attorney

By:_____
MATTHEW S. KASER, WSBA # 32239
Assistant City Attorney, City of Lakewood

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing on:

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The undersigned hereby declares, under penalty of perjury, that the foregoing statements are true and correct.

EXECUTED this 23rd day of May, 2014 at Lakewood, Washington.

_____
Matthew S. Kaser

LAKEWOOD CITY ATTORNEY

May 23, 2014 - 2:05 PM

Transmittal Letter

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